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Kirk v. Wescott Appellant's Brief Dckt. 42593

IN THE SUPREME COURT OF THE STATE OF IDAHO

ANDREW and KIMBERLY KIRK, husband and wife, Plaintiffs/Appellants, v. ANN B. WESCOTT f/k/a ANN B. McELVEEN, Defendant/Respondent.	Sup. Ct. Doc. No. 42593-2014 Blaine County No.: 2012-570

APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF BLAINE

HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE, PRESIDING

Jed W. Manwaring, ISB No. 3040
Christy A. Kaes, ISB No. 4852
EVANS KEANE LLP
1161 West River Street, Ste. 100
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
E-mail: jmanwaring@evanskeane.com
ckaes@evanskeane.com

Attorneys for Plaintiff/Appellants

Kim J. Trout, ISB No. 2468
TROUT LAW, PLLC
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703
Telephone: (208) 577-5755
Facsimile: (208) 577-5756

Attorney for Defendant/Respondent

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P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
E-mail: jmanwaring@evanskeane.com
ckaes@evanskeane.com

Attorneys for Plaintiff/Appellants

Kim J. Trout, ISB No. 2468
TROUT LAW, PLLC
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703
Telephone: (208) 577-5755
Facsimile: (208) 577-5756

Attorney for Defendant/Respondent

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STATEMENT OF THE CASE

(i) Nature of the Case:

This is a quiet title case involving the interpretation of a temporary easement. Appellants Andrew and Kimberly Kirk ("Kirks") seek to quiet title to the southeast corner of their property lot located in a plated subdivision in Blaine County, Idaho. The Respondent Ann Wescott ("Ms. Wescott") owns the adjoining lot and contends that the southeast corner of the Kirks' lot is encumbered by a "temporary Easement of Access" granted to her by the prior owner/developer of the lots. The purported "temporary Easement of Access" (hereinafter "Temporary Easement") was attached as an exhibit to the Warranty Deed that transferred Lot 8 to Ms. Wescott.

The Kirks contend that the purported Temporary Easement never came "In Effect" for lack of satisfaction of an express condition precedent stating that "[t]his Easement of Access shall become 'In Effect' only upon receipt by the owner (of Lot 8) of written denial by the USFS for the owner (of Lot 8) to access Lot 8 across USFS lands on the East side of the property line (of Lot 8) and beginning at Bench Road." The document further places a one year time limit on the Temporary Easement in any event, which has long since expired. Notwithstanding, the District Court ruled on partial summary judgment that as a matter of law the Temporary Easement must remain permanently on the SE corner of Kirks' Lot 7. The District Court denied two successive Motions to Amend Complaint. After a short trial limited in scope to the issue of equities, the District Court dismissed the Kirks' Complaint.

(ii) Course of Proceedings:

The Kirks filed a Complaint to quiet title to the SE corner of their Lot 7 against the Temporary Easement pursuant to Idaho Code § 6-401 et. seq. against Ms. Wescott on August 3,

2012. R. Vol. 1, p. 8. The disputed alleged Temporary Easement, attached to Ms. Wescott's Deed reads as follows:

> Exhibit "1"
> 105 Jones Lane
>
> This Warranty Deed shall include a temporary 25 foot wide Easement of Access. (See plat map - Exhibit 2) over the Southeast corner of Lot 7 of Block 1 of the Glassford Heights Sub for access to Lot 8 of the Glassford Heights Sub. When/if Blaine county and the United States Forest Service provide a permanent access across USFS Lands to Lot 8, the owner of Lot shall Quitclaim the Easement of Access back to Lot 7 within 30 days of written receipt thereof.
>
> This Easement of Access shall become "In Effect" only upon receipt by the owner (of Lot 8) of written denial by the USFS for the owner (of Lot 8) to access Lot 8 across USFS lands on the East side of the property line (of Lot 8) and beginning at Bench Road. This Easement of Access shall remain "In Effect" only until Blaine County agrees to allow access to Lot 8 from Jones Lane. The owner's of Lot 8 shall Quitclaim the Easement of Access back to Lot 7 within one year or upon completion of the driveway, whichever occurs first.

R. Vol. I, p. 13. The Complaint alleged that Ms. Wescott obtained a 30-year (with 10-year renewal) access easement in May 2007 from the United States Forest Service ("USFS") on the east side of her Lot 8 such that the conditions for requiring a Temporary Easement no longer existed. R. Vol. 1, pp. 16-21. Ms. Wescott answered and filed her Motion for Summary Judgment on October 28, 2013, arguing that the Kirks' Complaint must be dismissed on the basis that a USFS Easement does not provide permanent access to Lot 8, and that one portion of the Temporary Easement could not be satisfied according to the express terms. R. Vol. 1, p. 26. The Kirks filed their Cross-Motion for Summary Judgment on March 5, 2014. R. Vol. 1, p. 45. The Kirks' Memorandum in Support of Cross Motion for Summary Judgment asserted that the Temporary Easement never came into effect or, if it did, it expired under its expressed terms, or in the alternative, that Ms. Wescott abandoned her interest in the Temporary Easement. R. Vol. 1, p. 47.

At the summary judgment oral argument on March 31, 2014, the District Court issued an oral ruling from the bench including the following statements:

> Well, this certainly is a problem, and it isn't clear from the face of the document exactly what was intended. I don't think I can look at any particular line and say this is clear and unambiguous and therefore this yields a clear result. I think you have to read the document as a whole and you can't pick out one part and have that be determinative, and that seems to be the problem here.
>
> . . .
>
> But I have to rule as a matter of law that the forest service has not given permanent access, and I think that that is clear from the pleadings and from the cross motions for summary judgment.
>
> . . .
>
> And I know that I am adding words that are not there in order to come up with these possible explanations, but to me that's the only thing that language could mean.
>
> . . .
>
> Another way that I looked at this is to say, well, this is a quiet title action. It's, I think, essentially equitable. I don't think it's a jury trial issue.
>
> . . .
>
> And lord knows what the last line means, but because they solved it, it would seem to be very inequitable to the party who obtained the easement to then turn around and have a court say, well, you really got hoaxed here.
>
> . . .
>
> It is a cloud, I certainly agree, on the servient lot, but I hope it's not a cloud that ever causes a problem.

Tr., Court's Rulings and Remarks on Summary Judgment Motions, March 31, 2014, pp. 2, 3, 8, 11, 12, 13. The District Court went on in its oral ruling to grant partial summary judgment to Ms. Wescott finding: (i) that the U.S. Forest Service has not provided a permanent access to Ms. Wescott; (ii) that Blaine County is no longer in a position to provide any access and, therefore, cannot fulfill one of the conditions of the Temporary Easement; and (iii) that there has been no abandonment of the Temporary Easement. Tr., Court's Rulings and Remarks on Summary Judgment Motions, March 31, 2014, p. 20, L. 15-20.

On April 18, 2014, the Kirks filed a Motion to Amend Complaint based upon the discovery of new evidence, that being an August 2000 USFS Forest Road Easement for which legal description referenced "A 33' WIDE EASEMENT TO ACCESS LOTS 8 & 9." This newly discovered easement, while issued to the owners (Woodcocks) of Lot 9, did not have a year term limit and the recorded legal description arguably was intended to benefit Westcott's adjoining Lot 8 "to continue for as long as the property served is used for a single family residence." R. Vol. 1, pp. 111-125. The Kirks filed the Plaintiffs' Memorandum in Support of Motion to Amend Complaint, setting out the newly discovered evidence of the August 2000 USFS easement providing the arguable permanent access to Wescott's Lot 8. R. Vol. I, p. 126. Ms. Wescott filed a Memorandum in Opposition to Plaintiff's Motion to Amend Complaint on April 28, 2014. R. Vol. I, p. 148. A hearing was held on said motion on May 5, 2014, and the District Court denied Plaintiff's Motion to Amend the complaint once again, ruling from the bench with statements including:

> [S]o whatever evidence we gather of Woodcocks' intent and the government's intent as expressed to Blaine County or the intent that might be gleaned from the parties and Mr. Manwaring saying we can present evidence of all these people's intent, that matters not.
>
> . . .
>
> And I can take evidence for weeks on what everybody intended and what they wanted to do . . . .
>
> . . .
>
> That brings up a couple of other points. Even on its face, if I – if I heard additional evidence, the easement that exists now from the government says it expires. And we can argue about what that means, and I can come up with my conclusions about what that means . . . .
>
> . . .
>
> My point is, is that it's a question when it expires. It's a question whether it's permanent so long as it's used – for a personal residence. To me, that's not permanent. You can argue that it is.
>
> . . .

> So if I entertain the motion to amend and I listen to the evidence and if I granted the relief that's requested by the plaintiff, what I would be doing is trading a cloud on the title of the plaintiffs to leaving Ms. Wescott with title questions. That doesn't benefit anyone.
>
> . . .
>
> I can't solve the problem by entertaining evidence as to the questions that Mr. Manwaring has been able to raise. When he says, you know, there are issues of fact and there are questions of intent, I'll certainly agree with that, but even resolving those and even if I resolved them in his favor, I would simply be leaving Ms. Wescott with a worse problem than the Kirks have.
>
> . . .
>
> But if we're going to have a trial and argue about it, it just better be real clear that it's a permanent easement or the trial is going to take five minutes, because I don't need to hear intent, I don't need to hear -- I don't want to hear any evidence of who intended what or, really, what you were trying to get at with the amended complaint.
>
> . . .
>
> But, like I say, I want to be clear here, I don't want to have a trial and hear what anybody intended.

Transcript of Court's Rulings and Remarks, May 5, 2014, pp. 5, 6, 7, 8, 9, 13, 18. The Court entered an Order dated May 28, 2014 denying the Motion to Amend. R. Vol. I, p. 174. A trial was set for July 23, 2014 limited to the issue of equities, but excluding any evidence of the intent as to interpretation of the Temporary Easement.

Prior to trial, a Renewed Motion to Amend Complaint was filed by Plaintiffs on July 14, 2014, due to receipt of an extremely late supplemental document production from Ms. Wescott, including 109 pages of documents that had not previously been produced by Defendant, some of which had been withheld but supported Plaintiffs' assertion in the proposed First Amended Complaint that the Woodcocks' August 2000 USFS easement was intended to benefit Wescott's Lot 8. R. Vol. I, pp. 216-261. At the trial held on July 23, 2014, the District Court denied the Kirks' Renewed Motion to Amend Complaint, refused to admit certain documents to show intent

of the parties, and dismissed Plaintiffs' petition to quiet title. Transcript on Appeal, July 23, 2014, p. 8-31, 129. A short trial then occurred limited to any equities and excluding any evidence of intent. The District Court then entered its Judgment for the Defendant Wescott on August 25, 2014. R. Vol. I, p. 281.

On September 4, 2014, Ms. Wescott filed her Memorandum of Costs [and attorney fees], (Suppl. R. pp. 1-29), to which Plaintiffs filed a timely Objection to Memorandum of Costs and Amended Objection and Motion to Disallow Memorandum of Costs (Supp. R. pp. 30-35). The District Court heard the attorney fee claim on October 27, 2014 and denied the attorney fees in a bench ruling followed by an Order Denying Attorney Fees entered on November 3, 2014. R. Vol. I, p. 289.

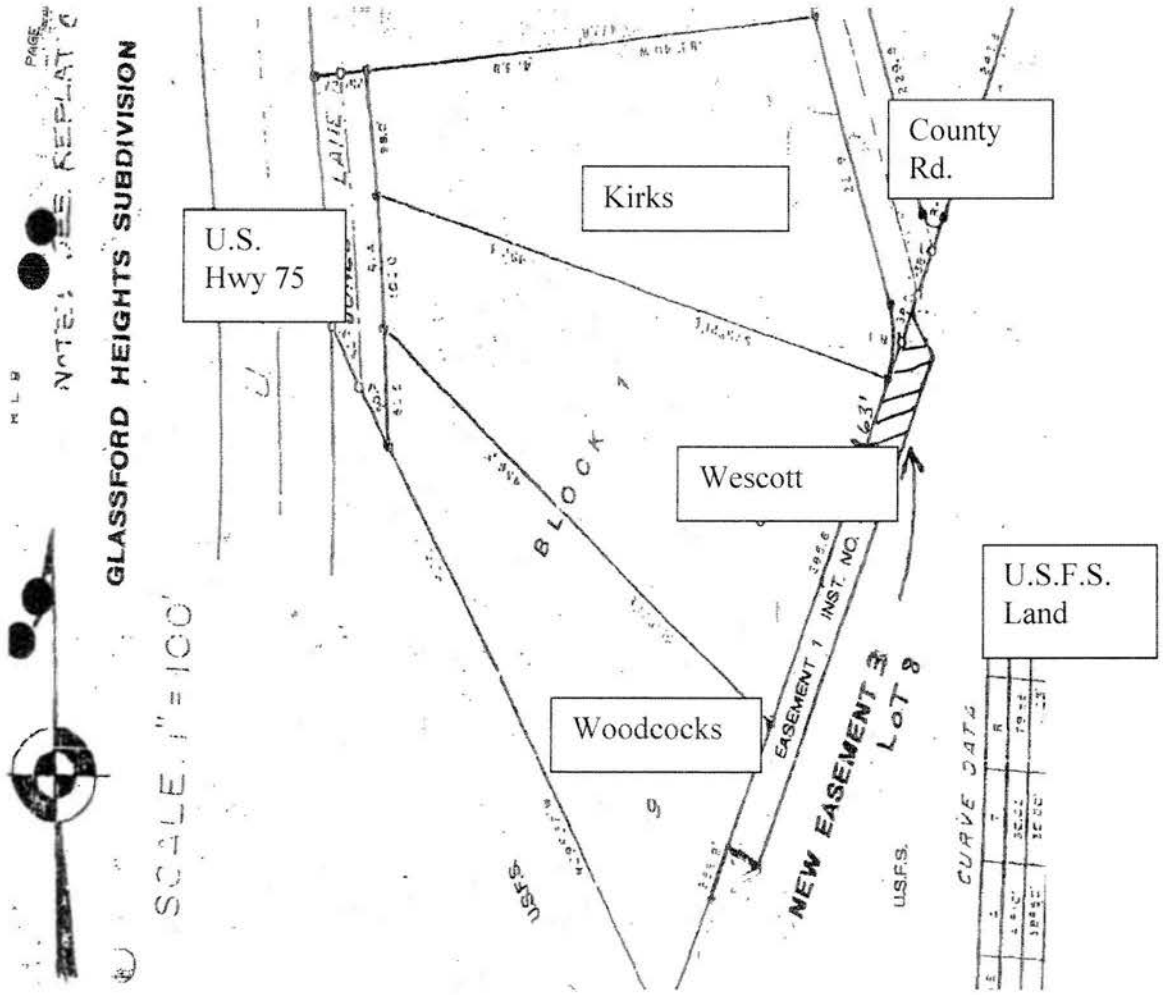
The Kirks filed their Notice of Appeal to this Court on October 2, 2014. R. Vol. I, p. 285. After the attorney fee issue was decided an Order Denying Attorney Fees and an Amended Judgment were entered on November 3, 2014. R. Vol. I, pp. 289, 293. Kirks then filed an Amended Notice of Appeal on November 14, 2014. R. Vol. I, p. 295.

Pursuant to I.A.R. 14(a) and 15(b), Ms. Wescott had 42 days from the Order Denying Attorney Fees and Amended Judgment (11/3/15) to file any cross-appeal, meaning Ms. Wescott could file a notice of cross appeal on or before December 15, 2014. However, Ms. Wescott did not file her Notice of Cross-Appeal until February 23, 2015, a full 98 days after the Order Denying Attorney Fees was entered. Supp. R. Vol. I, p. 70. Rather, on November 13, 2014, Ms. Wescott filed a Motion to Reconsider Defendant's Memorandum of Costs. Suppl. R. p. 58.

(iii) Statement of Facts:

In 1997, Leif Odmark (hereinafter "Mr. Odmark") was the owner of undeveloped real property, including Lot 7 and Lot 8, in the Glassford Heights Subdivision in Blaine County,

Idaho. R. Vol. I, p. 138-139. Douglas and Charlotte Woodcock (hereinafter "Woodcocks") owned the adjacent Lot 9. R. Vol I, p. 140. Bordering Lots 7, 8, and 9, was undeveloped platted access to the properties on the west border of the lots designated as "Jones Lane." R. Vol. I, p. 131; and platted map of Lots 7, 8, and 9 of Glassford Heights Subdivision at R. Vol. I, p. 21. Development of the Jones Lane access would have required construction of a driveway from State Highway 75 across jurisdictional wetlands. R. Vol I, p. 141. The Jones Lane property was owned by Blaine County. *Id.* There was also access on the east side of Lots 8 and 9 over U.S. USFS lands. R. Vol. I, p. 61. The USFS road access provided the historical access to both Lots 8 and 9. *Id.* A diagram of the lots and roads is as follows:



R. Vol. I, p. 21 (modified with owners' names).

In 1997 the Woodcocks, owners of the southern adjacent Lot 9, initiated their request to Blaine County to protect and preserve the wetlands by abandoning Jones Lane. R. Vol. 1, p. 141. This would prevent any development of Jones Lane for access to Lots 7, 8, and 9. *Id.* In conjunction with this request, the Woodcocks also applied for a Special Use Permit through the USFS for a permanent access easement over the USFS land bordering the east property line of Lots 8 and 9. R. Vol I, p. 130. A Special-Use Application and Report, prepared by Woodcock and Bruce Smith, a Professional Land Surveyor of Galena Engineering, Inc., states as follows:

> The **proposed use is a permanent easement** for all-year residential purposes, including utilities and access, for Glassford Heights Subdivision, Lot 9, from the existing Bench Road, a public road maintained by Blaine County… .
> **The proposed use would provide upland access to Lot 8 as well** and as Lot 7 is using upland access from Bench Road, eliminate the need to build Jones Lane and provide an opportunity for the preservation of the wetlands.

Id. (emphasis added).

On July 14, 1998, the then owner/developer of Lots 7 and 8, Leif Odmark, wrote to the USFS in favor of the proposed Woodcock Easement referring to it as a "permanent easement." R. Vol. I p. 234. On March 5, 1999, the USFS issued a News Release soliciting comments on the proposed easement stating that the proposed easement actually was an old right of way "which parallels Lots 8 and 9 [in Glassford Heights Subdivision]," "Access to these two lots was originally planned to be through Jones Lane." Exhibit 8 lodged with trial exhibits.

While Woodcocks' Special Use Application was pending with the USFS and Blaine County, Mr. Odmark sold Lot 8 to Mr. and Mrs. McElveen[1] (now known as Ms. Wescott) on April 14, 2000. The Warranty Deed granted by Mr. Odmark to the McElveens [Ms. Wescott] contains the following language:

[1] Ann McElveen returned to her maiden name of Wescott after her divorce from Mr. McElveen. Lot 8 was transferred via Quitclaim Deed to Ms. Wescott as a result of the divorce.

> Lot 8 in Block 1 of GLASSFORD HEIGHTS SUBDIVISION, according to the official plat thereof, recorded as Instrument No. 115702, records of Blaine County, Idaho.
>
> Together with a temporary Easement of Access described in the attached Exhibit 1.

R. Vol. I, p. 12. The Warranty Deed's Exhibit 1 which describes the "temporary Easement of Access" contains no metes and bounds legal description for an easement, but describes the following terms:

> Exhibit "1"
> 105 Jones Lane
>
> This Warranty Deed shall include a temporary 25 foot wide Easement of Access. (See plat map - Exhibit 2) over the Southeast corner of Lot 7 of Block 1 of the Glassford Heights Sub for access to Lot 8 of the Glassford Heights Sub. When/if Blaine county and the United States Forest Service provide a permanent access across USFS Lands to Lot 8, the owner of Lot shall Quitclaim the Easement of Access back to Lot 7 within 30 days of written receipt thereof.
>
> **This Easement of Access shall become "In Effect" only upon receipt by the owner (of Lot 8) of written denial by the USFS for the owner (of Lot 8) to access Lot 8 across USFS lands on the East side of the property line (of Lot 8) and beginning at Bench Road.** This Easement of Access shall remain "In Effect" only until Blaine County agrees to allow access to Lot 8 from Jones Lane. **The owner's of Lot 8 shall Quitclaim the Easement of Access back to Lot 7 within one year or upon completion of the driveway, whichever occurs first.**

R. Vol. I, p. 13 (Emphasis Added). The condition precedent to the easement, i.e. the denial by USFS of access to Lot 8, had not been satisfied. R. Vol. I, p. 67, ¶ 6.

Just four months later, the USFS granted Woodcocks' Special Use Application by issuing a Forest Road Easement recorded in Blaine County on August 15, 2001 as Instrument No. 442116. It provided the legal description title as "A 33' WIDE EASEMENT TO ACCESS LOTS 8 & 9." R. Vol. I pp. 121-125. The easement was to "continue for as long as the property served is used for **a single family residence."** R. Vol I, p. 121 (emphasis in original).

The Blaine County Board of Commissioners Staff Report vacating Jones Lane specifically states, "[o]n August 3, 2000 a road easement was dedicated to Douglas and Charlotte Woodcock by the U.S. Forest Service, Instrument #442116. The easement **provides access to Lots 8** and 9 from Bench Road on the east side of the lots." R. Vol. I, p. 237, ¶ 6 (emphasis added).

The McElveens (Ms. Wescott) proceeded to develop Lot 8 and built a home and constructed a paved driveway accessing the USFS road. R. Vol. I, p. 60-70. The Temporary Easement of access across Lot 7 was never used or needed by the McElveens (Ms. Wescott) from the time Lot 8 was acquired on April 14, 2000 until present. R. Vol. I, p. 65.

Unfortunately, this documentary evidence surrounding the Woodcocks' application for a permanent easement: the Application; the Blaine County's letter support for the application; the developer-Odmark's letter of support for the application; the USFS' News Release; the County's interpretation of the easement; and the Woodcocks' easement itself, were not discovered until after the Complaint was filed and summary judgment was pending. A Motion to Amend Complaint (R. Vol I, pp. 111-125) and a second Renewed Motion to Amend Complaint (R. Vol. I, pp. 216-261) were filed and asserted, but the District Court denied both motions, refusing to consider the intent of the parties in interpreting Wescott's Temporary Easement. Transcript of Court's Rulings and Remarks, May 5, 2014, pp. 5, 6, 7, 8, 9, 13, 18; Transcript on Appeal, July 23, 2014, pp. 4-31.

On May 15, 2007, a subsequent non-exclusive access easement was granted directly to Ms. Wescott by the USFS, and recorded as Instrument No. 547881, Records of Blaine County, Idaho, on May 22, 2007 (the "Wescott Easement"). R. Vol. I, p. 16-21. The Wescott Easement covers the same location and includes the identical "Exhibit A" establishing the property

description of the easement as attached in Exhibit A to the previous Woodcock Easement. *Id.* at p. 21. Again, the legal description to the easement states "A 33' WIDE EASEMENT TO ACCESS LOTS 8 AND 9, GLASSFORD HEIGHTS SUBDIVISION." *Id.* This subsequent easement has caused confusion with its expiration date of December 31, 2036, and renewal period of 10 years "(or the estimated life of the project, whichever is less)." R. Vol. I, p. 16. By its terms, the easement does not override the pre-existing Woodcock Easement that was granted in August 2000. *Id.*

The USFS access road became known as Blackwood Lane. R. Vol 1, p. 58-59. Ms. Wescott's address is listed as 10 Blackwood Lane, Ketchum, Idaho. *Id.* Ms. Wescott's driveway is at least 25' away from the boundary line of Lot 7. *Id.* at 20. Her driveway extends directly onto the USFS easement road. R. Vol. I, p. 61-62. Ms. Wescott has never driven over any portion of Lot 7 for access to her property. R. Vol. I, p. 65. Ms. Wescott has had continuous use of the USFS road and there has been no interference of Ms. Wescott's use of this road by neighbors, USFS, Blaine County, or anyone else. R. Vol. I, p. 63.

On or about January 11, 2010, the Kirks acquired title to Lot 7. R. Vol. 1, p. 10, ¶ 12. Sometime later in 2010, subsequent to the purchase of Lot 7, the Kirks became aware that Ms. Wescott claimed to own an easement in the southeast corner of Lot 7. Appellants brought this action to quiet title to their property.

ISSUES ON APPEAL

1. Did the District Court commit error in granting partial summary judgment and refusing to consider issues of fact as to the intent of the parties regarding the Temporary Easement?

2. Did the District Court commit error in denying Plaintiffs' Motion to Amend Complaint based upon newly discovered evidence bearing on the intent of the parties to the Temporary Easement?

3. Did the District Court commit error in denying Plaintiffs' Renewed Motion to Amend Complaint based upon Defendant's withholding of documents until two weeks before trial which documents additionally supported Plaintiffs' asserted intent of the parties to the Temporary Easement?

4. Should the District Court have found after trial that the Temporary Easement was void for lacking an adequate legal description?

ISSUES ON CROSS-APPEAL

1. Is the Supreme Court without jurisdiction to hear the Notice of Cross-Appeal because it was filed untimely?

2. Did the District Court commit error in finding that the Plaintiffs' Complaint was not filed or pursued frivolously pursuant to Idaho Code §12-121?

ARGUMENT

I. Standard of Review.

A. Summary Judgment.

When this Court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at 870. "The record is construed in the light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of

that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate. On appeal, this Court exercises free review." *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 345, 33 P.3d 816, 819 (Idaho 2001).

B. Ambiguity of Document.

"The existence of ambiguity determines the standard of review of a lower court's interpretation of a contract or instrument." *Machado v. Ryan*, 153 Idaho 212, 217, 280 P.3d 715, 720 (Idaho 2012). "The legal effect of an unambiguous written document must be decided by the trial court as a question of law." *Id.* "If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact." *Id.* "Whether a document is ambiguous is a question of law." *Id.*

C. Motion to Amend Complaint.

"A court's decision to allow the amendment of pleadings is reviewed for an abuse of discretion. When determining whether a trial court has abused its discretion, this Court asks: '(1) whether the court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of that discretion and consistently with any applicable legal standards; and (3) whether it reached its decision by an exercise of reason.'" *Hayward* at 345 (citing *Hough v. Fry*, 131 Idaho 230, 232, 953 P.2d 980, 982 (1998)) (internal citations omitted).

II. On Summary Judgment, the District Court Should Have Found the Temporary Easement to be Ambiguous as a Matter of Law and Thereafter Allowed a Trial on the Facts to Determine the Intent of the Parties.

The primary goal in construing a deed is "to seek and give effect to the real intention of the parties." *Hoch v. Vance*, 155 Idaho 636, 639, 315 P.3d 824, 827 (Idaho 2013) (citing *Machado v. Ryan*, 153 Idaho 212, 218, 280 P.3d 715, 721 (2012)). "If the language of a deed is ambiguous, determining the parties' intent is a question of fact and may only be settled by a trier

of fact." *Id.* "[W]hen the language of the deed is unambiguous, the intention of the parties is a matter of law ascertained from the deed's plain language without the aid of extrinsic evidence." *Id.*

Whether a deed is ambiguous is a question of law. *Id.* at 638 (citing *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 154 Idaho 6, 8, 293 P.3d 630, 632 (2012)). "Ambiguity may be found where the language of the deed is subject to conflicting interpretations." *Id.* at 639. However, ambiguity does not exist simply because opposing parties differ in their interpretations. *Id.* (citing *Jasso v. Camas Cnty.*, 151 Idaho 790, 798, 264 P.3d 897, 905 (2011)). "To determine whether a deed is ambiguous, [the deed] must be reviewed as a whole." *Id.* (citing *Neider v. Shaw*, 138 Idaho 503, 65 P.3d 525, 530 (2003)).

Likewise, "[i]n construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted." *Coward v. Hadley*, 150 Idaho 282, 286, 246 P.3d 391, 395 (2010) (citing *Koulouch v. Kramer*, 120 Idaho 65, 69, 813 P.2d 876, 880 (1991)).

The Temporary Easement contains numerous ambiguous statements and terms. The trial court stated in the initial hearing in this matter, "Well, this certainly is a problem, and it isn't clear from the face of the document exactly what was intended. I don't think I can look at any particular line and say this is clear and unambiguous and therefore this yields a clear result. I think you have to read the document as a whole and you can't pick out one part and have that be determinative, and that seems to be the problem here." Transcript Court's Rulings & Remarks on Summary Judgment Motions, March 31, 2014, p. 2, L. 9-16. That being said, however, the trial court then focused its interpretation of the Temporary Easement only on the specific

meaning of the word "permanent" in the second sentence of the document. By taking a narrow view of only one word of the document, the District Court failed to consider the document as a whole and the circumstances existing at the time the document was drafted. The Temporary Easement is a classic example of an ambiguous document, especially when one considers the subsequently discovered documents including: Woodcocks' Special Use Permit Application; Blaine County letter to USFS; Odmark's letter to the USFS; the USFS' News Release; the August 2000 Woodcocks' Forest Road Easement; and the Staff Report to the Blaine County Board of County Commissioners.

"Ambiguity can be found where the language of the deed is subject to conflicting interpretations. The trier of fact must then determine the intent of the parties according to the language of the conveyance and the circumstances surrounding the transaction." *Marek v. Lawrence,* 153 Idaho 50, 53, 278 P.3d 920, 923 (Idaho 2012).

Appellants, Kirks, contend that the district court erred in not specifically ruling as a matter of law that the easement terms were ambiguous. If such a ruling had been entered, the court would be required at trial to consider all extrinsic evidence of the intent of the parties and the circumstances in existence at the time the easement was drafted.

III. The District Court abused its Discretion in Denying Plaintiffs' Motions to Amend Complaint and Excluding Evidence of the Intent of the Temporary Easement.

Idaho Rule of Civil Procedure 15(a) specifies "[A] party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires..." I.R.C.P. 15(a). "[I]n the interest of justice, district courts should favor liberal grants of leave to amend a complaint." *Hayward v. Valley Vista Care Corporation*, 136 Idaho 342, 345, 33 P.3d 816, 819 (Idaho 2001) (citing *Carl H. Christensen Family Trust v.*

Christensen, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999)). "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be freely given." *Id.* at 346.

"Other factors this Court considers when reviewing a trial court's decision to grant a motion to amend include: 1) if the amended pleading provides a valid claim; 2) if the opposing party would be prejudiced by the delay in adding the claim; and 3) if the opposing party has an available defense such as the statute of limitations." *Id.*

In the instant case, the Kirks moved to amend the complaint shortly after the summary judgment hearing, due to the discovery of new evidence and potential witnesses that would support the assertion that the Woodcock Easement granted by the USFS in August 2000 was the very easement contemplated by the language four months earlier in April 2000 in the Warranty Deed/Temporary Easement from Mr. Odmark to Ms. Wescott. R. Vol. I, p. 115, ¶¶ 8, 10. The Motion to Amend Complaint identified the newly discovered documents of: the Woodcock Forest Road Easement of August 2000; the Special-Use Application and Report; and an August 11, 1998 letter from Blaine County to USFS. R. Vol. I, pp. 121-125, 130-142. On May 5, 2014, the District Court wrongly denied the motion to amend the complaint holding that it refused to consider the new documents as evidence of intent bearing on the Temporary Easement. Transcript of Court's Rulings and Remarks, May 5, 2014, pp. 5, 6, 7, 8, 9, 13, 18; R. Vol. I, p. 174. This was an abuse of discretion and contrary to Rule 15(a) that amendments should be "freely given."

The Kirks subsequently filed a Renewed Motion to Amend Complaint on July 14, 2014, after a significantly late supplemental production of documents from Ms. Wescott revealing: a July 14, 1998, letter from Odmark to USFS and a Staff Report to Blaine County Board of Commissioners. R. Vol. I, pp. 216-245, 261-263. Both of these documents supported the allegation in the proposed First Amended Complaint that the "permanent easement" referenced in the Temporary Easement was intended to mean the August 2000 Woodcock Easement.

In June 2013, counsel for Ms. Wescott responded to Plaintiffs' requests for production of documents for all relevant documents and correspondence pertaining to the case described in several ways. R. Vol. I, pp. 219-223. When these documents were not forthcoming, a letter was sent to Mr. Trout in February 2014 seeking production of such documents. R. Vol. I, pp. 224-226. Again, there were no documents provided as Mr. Trout claimed he had produced all the documents. R. Vol. I, pp. 227-228. Then, on July 7, 2014, just two weeks before trial, Mr. Trout supplemented with over 100 pages of documents, including documents with key information as to the intent and circumstances surrounding the historical information leading up to the drafting of the Temporary Easement. R. Vol. I, pp. 229-245. Kirks' counsel argued in support of the Renewed Motion to Amend Complaint:

> Now, Mr. Trout had these documents in his possession, and he didn't produce them to me before Ms. Wescott's deposition. He didn't produce them to me before we had the cross motion for summary judgment. He didn't produce them to me while we had the motion to amend in May [2014], and he didn't produce them to me until after my deadline to produce my evidence in preparation for this hearing today, this trial today [July 23, 2014]. My deadline was July 2nd [2014].

Transcript on Appeal, July 23, 2014, p. 11-12.

> These documents are key. They also infer and indicate that the Woodcock easement of August 2000 was this supposed permanent easement that Mr. Odmark references in his deed to the Wescotts. That's the one they were

> contemplating when he made up the language that is so ambiguous on the temporary easement.
>
> So based upon the withholding of those documents and the late disclosure, I think it's only fair and equitable the plaintiffs' motion to amend be renewed, the renewed motion be granted, and the Court give plaintiff the opportunity to go forward into December 17th [2014] to develop that additional claim under the amended complaint, which is the same that was filed back in April [2014].

Transcript on Appeal, July 23, 2014, p. 12-13.

When asked by the District Court to respond to the allegations that the documents had been wrongfully withheld, Mr. Trout explained as follows:

> Well, that's my fault. I['m] not going to deny – I didn't withhold them. I didn't actually understand that I had them. I had a bunch of documents – we looked at what we thought was relevant to the case, and we produced documents as part of the expert opinion. And the only reason we made a supplement, the only reasons – there was one reason: We just threw the whole batch in the scanner, scanned them and sent them.

Transcript on Appeal, July 23, 2014, p. 22-23.

> Now, if I made a mistake, I'll 'fess up. If I'm wrong about making that supplement, I'll 'fess up. If it was late, I'll 'fess up. At the end of the day, Judge, so what? He has two inadmissible documents that mean nothing to the interpretation of this case; and yes, they could have been found. We didn't go looking for them because we didn't go looking for them. They just happened to be in a big group of paper.

Transcript on Appeal, July 23, 2014, p. 23. While the District Court expressed sympathy, he nevertheless denied the Renewed Motion for Summary Judgment reaffirming his previous summary judgment ruling that there is no "permanent" easement from the USFS for Ms. Wescott, so it does not matter what the intent of the Temporary Easement was. Transcript on Appeal, July 23, 2014, pp. 28-31. This denial was additional abuse of discretion and the standard of Rule 15(a) that amendments should be "freely given." Through this denial, the District Court effectively condoned the withholding of requested documents which bear on the intent of the drafter of the Temporary Easement.

Through its denials of motions to amend, the District Court foreclosed itself from considering documents and witnesses surrounding the documents to determine the intent of the drafter and the circumstances existing at the time the Temporary Easement. First was a letter from Leif Odmark to Kurt Nelson at the USFS dated July 14, 1998, detailing that Mr. Odmark had met with and coordinated with Douglas Woodcock on the pending "application for a permanent easement" and referencing Lot 8. Transcript on Appeal, July 23, 2014, p. 11, L. 4-11. Admission of Mr. Odmark's letter would have provided the Court with evidence of Mr. Odmark's intent in creating the Temporary Easement and assisted the Court with the interpretation of the document as a whole. The second document excluded by the District Court was a letter from Blaine County Planning and Zoning to Kurt Nelson at the USFS, dated August 11, 1998, regarding the application for a special use permit. The Blaine County Planning and Zoning Department recommended that "access to Lot 8 should be allowed from this same easement that the Woodcocks are requesting, if it is approved." Transcript on Appeal, July 23, 2014, p. 36. Admission of this letter would establish the clear intent to grant permanent access through the USFS for both Lots 8 and 9 as a precondition of vacating Jones Lane. The Staff Report to the Blaine County Board of Commissioners and the Forest Service News Release both were excluded from consideration for any evidence of intent.

All relevant evidence of intent regarding an ambiguous document should be allowed. "When an instrument is ambiguous in nature, the intention of the parties as reflected by all of the circumstances in existence at the time the easement was given must be considered in construing the granting instrument." *Latham v. Garner*, 105 Idaho 854, 858, 673 P.2d 1048, 1052 (Idaho 1983) (citing *Quinn v. Stone*, 75 Idaho 243, 250, 270 P.2d 825, 829-30 (1954)). "Therefore, the trial court should have considered extrinsic evidence of the circumstances and intentions of the

original parties to the easement." *Id.* "...[T]he trial court must consider all of the extrinsic evidence in the record to determine what the intentions of the parties were when they executed and accepted the instrument. *Id.* "The parties should be permitted to reopen and introduce any additional relevant evidence on the question of intent that they may have." *Id.*

Failure to grant the motions to amend the complaint to open up these documents and their respective witnesses into the case, constituted error of the court because the documents provide relevant evidence of both the intent of the drafter of the easement and the circumstances in existence at the time the Temporary Easement was drafted. Granting the amendment to the complaint with these documents and witnesses would have shown that Mr. Odmak, Blaine County, the USFS, and the Woodcocks were working together to preserve the wetlands area bordering Lots 7, 8, and 9 by vacating Jones Lane. In order to prevent problems of access to these lots, all parties and agencies involved were working towards the establishment of permanent access over the USFS lands to the east of the lots. This had been contemplated since 1998, two years prior to the sale of Lot 8 to Ms. Wescott. At the time the sale was negotiated, Mr. Odmark was fully expecting the USFS to grant the permanent access to Lots 8 and 9 within a short time. The Temporary Easement constituted a short-term solution to cover that period until the access easement was recorded by the U.S. Forest Service. The access contemplated was provided within four months of the transfer of Lot 8 to Ms. Wescott and was recorded on August 15, 2000. Mr. Odmark's letter to the USFS uses the same language that was used in the Temporary Easement, clarifying his intention that the Temporary Easement was only to be in place until the USFS access was resolved. The District Court erred in refusing to allow the amendments to the case.

IV. The Temporary Easement is Equitably Unenforceable and Void for Lack of an Adequate Legal Description.

The Plaintiffs' original Complaint alleged in paragraph 16 that:

> 16. Plaintiffs are entitled to a judgment quieting title that the Temporary Access Easement is expired, void, terminated, and is no longer an encumbrance on the Plaintiffs' property.

One of the equitable legal principals voiding a real property transfer is the lack of an adequate legal description. At the trial limited only to equitable issues, Mr. Kirk testified, referring to the language of the Temporary Easement, as follows:

> Q So you testified you went to the courthouse, and you found the map and the deed, and it had this --
> A Easement.
> Q This easement?
> A Yes.
> Q So you read it at that point?
> A Yes.
> Q Is there any way, can you measure that easement or chart it out? Did you try do that on the corner of your lot?
> A I tried to decipher what the coordinates are, but there are no coordinates of this easement. It's ambiguous as to what, where, and how, if it was needed, where it would be.
> . . .
> Q I'd ask you, Mr. Kirk, to turn to Plaintiffs' Exhibit 3. That's the warranty deed you found at the courthouse, correct?
> A Correct.
> Q And the second page is the temporary easement that you just referred to?
> A The circled part on page 2?
> Q The second page where it says Exhibit 1.
> A Oh, yes.
> Q That's the writing about the temporary easement, correct?
> A Yes.
> Q Okay. And that's -- is that the part that you said you didn't have any coordinates on it?
> . . .
> WITNESS: Yes.

. . .

Q Okay. So what would you say to Judge Elgee as the equitable basis for why you would want the Court to quiet title to this corner of your property in you rather than leave this problem there for Ms. Wescott's temporary easement? What would you say to Judge Elgee?
A I would say, one, we're arguing over a temporary easement which, in my view, doesn't even or wouldn't solve the problem if Ms. Wescott was ever revoked the permanent or the easement from the forest service, because if I measure 25 feet, it doesn't even reach the county road. It would still access onto the forest service easement road anyway --

. . .

Q Okay. How does that weigh, in your mind, as to equities that you would say to Judge Elgee as to having your corner of your lot continued to be clouded by this problem?
A I'm kind of gun shy to speak now.
Q Right. Go ahead.
A It leaves me holding the bag here for the neighbor with a cloud over my title with an easement that's not defined, but yet she still has access, she's got a driveway, it's in pavement, Hitchins, south of her access. Has two lovely homes there, permanent access. But I've got cloud over my title that I can't use this part of my lot now at that I purchased because of the interpretation of the temporary easement that Leif Odmark, a layman in himself over these things, the way I understand it, put in a temporary easement to help Ms. Wescott get access if she needed to if they didn't come up with the forest service easement, which they did.

Transcript on Appeal, July 23, 2014, pp. 65 Ll. 17-23; 66-67 Ll. 17-1; 68-69 Ll. 16-2; 78-79 Ll.

15-8. In closing argument, Kirks' counsel argued in part:

But when you look at this language on this temporary easement, and the word temporary is used over and over, so we know it was intended to be something short-term, but it uses 20-foot wide easement in the southeast corner of lot 7, block 1. And the only additional information is on the attachments, two circles. The next page it just circles the corner

there, no metes and bounds, no measurements, no nothing, just a circle on the corner. And then the last page is a little more defined, but it's kind of a triangle drawn. No measurements, no nothing. I challenge anybody to go in there and decide, where does the 25-foot start? As what corner? Where do you start the measurement for 25 feet? Wide or long? Is it the width north to south or east to west? There's no way to decide what that easement is. It's so vague and ambiguous, it's a big problem for enforcing this thing. But it is what it is.

Transcript on Appeal, July 23, 2014, pp. 94-95, Ll. 9-2.

With regards to the sufficiency of real property transfer descriptions, a court must be able to determine from the face of the express document, not only the quantity and identity of the property being transferred, but also its boundaries. *Lexington Heights*, 140 Idaho at 281, 92 P.3d at 531; *Bauchman-Kingston*, 2008 WL 5133788 at *3; *Ray*, 146 Idaho at 629, 200 P. 3d at 1178; and *Magnolia Enterprises, LLC v. Schons*, 2009 WL 1658022, *4. The express document may reference an extrinsic document if that document is exact in detailing the quantity, identity and boundaries of property being sold. *Id.* "A property description that does not allow the court to pinpoint exactly what acreage is to be transferred is inadequate." *Bauchman-Kingston*, 2008 WL 5133788 at *3; *Ray*, 146 Idaho at 630, 200 P. 3d at 1179.

In the 2004 *Lexington Heights* case, the Idaho Supreme Court found a land sale contract invalid for failing to exactly describe the boundaries of the acreage reserved from the sale of a larger parcel. *Supra.* Lexington Heights Development, LLC, ("Lexington Heights") entered into an express agreement for the purchase of approximately 90 acres to be carved from a 95-acre parcel owned by Roger and Elizabeth Crandlemire. *Lexington Heights*, 140 Idaho at 279, 92 P.3d at 529.

Since the *Lexington Heights* case, this Supreme Court has revisited the issue of deficient property descriptions in 2008 in the case of *Bauchman-Kingston Partnership, L.P. v. Haroldsen* to reach the same conclusion. *See generally, Bauchman-Kingston Partnership, L.P. v. Haroldsen* 2008 WL 5133788 (2008). The parties in the *Bauchman-Kingston* case executed a written document in May of 2000 for the phased purchase of 200-acres located in Bonneville County, Idaho. 2008 WL 5133788 at *1. Under the terms of the contract, Bauchman–Kingston was to purchase the acreage over a six year period of time, which would culminate in the final purchase of the Seller's personal residence and out-buildings located on the last 4.9 acres. *Id.* By June of 2006, Bauchman-Kingston had purchased all but 36 acres upon which were 4.9 acres including the Seller's residence and some out-building. *Id.* at *3. Regarding the description of the 4.9 acres, the contract stated at paragraph 26:

> OTHER TERMS: BUYER AGREE TO PURCHASE SELLERS [sic] RESIDENCE AND OUT BUILDINGS LOCATED 3359 N 5 WEST, AT FAIR MARKET VALUE WITH TERMS ACCEPTABLE TO SELLER. PURCHASE PRICE SHALL BE BASED ON APPRAISEL [sic] ACCEPTABLE TO BOTH SELLER AND BUYER. BUYERS ARE COMPLETING A 1031 EXCHANGE WITH PURCHASE OF THIS PROPERTY.

Id. at *1.

The Supreme Court in *Bauchman-Kingston* declined to enforce the contract by relying on the *Lexington Heights* ruling to conclude the *Bauchman-Kingston* agreement was invalid and unenforceable as to the property description regarding the 4.9 acres. *Id.* The Court specifically stated, "when only part of a parcel is sold, and neither the land to be conveyed nor the portion to be retained by the seller is adequately described, the property description is inadequate." *Id.* at *3 (*citing to Lexington Heights*, 140 Idaho at 282, 92 P.3d at 532). The Court also emphasized that "[a] property description that does not allow the court to pinpoint exactly what acreage is to

be transferred is inadequate." *Id.* (*citing to White v. Rehn*, 103 Idaho 1, 3, 644 P.2d 323, 325 (1982)).

In 2009 in the case of *Ray v. Frasure*, the Idaho Supreme Court clarified in specific language the state of law as it pertains to the standard requiring property descriptions. *See generally, Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174 (2009). In the *Ray case*, the parties entered into a written agreement for the sale of property described as: "2275 W. Hubbard Rd., City of Kuna, County of Ada, Idaho 83634. " *Id.* at 626, 200 3d. 1175. The *Ray* Court rejected the written agreement because the property description contained in the agreement failed to specify the quantity and boundaries of the property being sold. *Id.* at 629, 200 3d. 1178. The Court stated, "A description of real property must adequately describe the property so that it is possible for someone to identify 'exactly' what property seller is conveying to the buyer." *Id.* (*citing to Garner v. Bartschi*, 139 Idaho 430, 435, 80 P.3 1031, 1036 (2003)). (emphasis added).

The state of the law in Idaho regarding the standard for property descriptions required is clearly stated. A reference to a lot and block number without a political subdivision is not enough. *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052 (1909). A reference to a tax parcel notice is not enough. *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031, 1036 (Idaho 2003). A reference to a street address without a legal description is not enough. *Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174, 1177 (Idaho 2009). A reference to a map with writing is not enough. *Bauchman-Kingston Partnership LP v. Haroldsen*, No. 3451, 2008 WL 5133788, at *4 (Idaho 2008). A reference to a survey yet to be conducted of land excluded from a sale is not enough. *White v. Rehn*, 103 Idaho 1, 644 P.2d 323,325 (1982). And finally, a reference to a survey to be performed after execution of the contract is not enough. *Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 92 P.3d 526, 531 (Idaho 2004). The Idaho Supreme Court, has

made it clear that this standard is strict. It is exacting, and it is the unwavering state of the law in Idaho.

In the present case, the only description in the Temporary Easement is that of a "25 foot wide Easement of Access (see plat map-Exhibit 2) over the Southeast corner of Lot 7 of Block 1 . . . ." The Exhibit 2 referred to has only a hand drawn circle around the triangular corner and another page has only a hand drawing on the plat map with no beginning point, no survey markings, no coordinates, no curvature descriptions, no lengths marked, and in short nothing to reasonably define the size and scope of the purported easement. Where does one begin to measure the purported 25 feet? Where does it end? What direction does the 25 feet run? How much acreage does it cover? What is the curvature on the SE corner? There are no answers to any of these reasonable questions as to where the purported easement is located. Not only is the language of the Temporary Easement vague, the court cannot determine quantity and identity with any degree of certainty where it is to be located on the ground.

Based upon the extensive case law authority set forth above, the trial court's failure to grant equitable relief to Kirks based upon the lack of an adequate legal description was clearly erroneous.

V. The Precondition was Not Satisfied for the Temporary Easement to Become "In Effect," and in any Event, the Temporary Easement Expired After One Year.

By the express terms of the Temporary Easement drafted by Mr. Odmark, the easement never came into effect. Pursuant to the second paragraph, the easement would only come "In Effect" upon receipt by the owner of Lot 8 of a written denial of access by the USFS. This grant of the "temporary Easement of Access" specifically states an express precondition to the title passing. The grant states that the easement does not become effective until and unless the owner

of Lot 8 receives a "written denial by USFS for the owner (of Lot 8) to access Lot across USFS lands on the East side of the property line (of Lot 8) and beginning at Bench Road."

It is undisputed that the owner(s) of Lot 8, Ms. Wescott, has never received a "written denial of access." Thus, the precondition was never satisfied giving effect to the "temporary Easement of Access." It is undisputed that Ms. Wescott historically used the USFS road on the east to access Lot 8 and that Ms. Wescott continues to use the USFS easement today. Based on these facts, at no time did the "temporary Easement of Access" become effective.

Notwithstanding this express precondition requiring absolute denial of an easement by the Forest Service before the "temporary Easement of Access" came into effect, the express terms of the "temporary Easement of Access" also contained specific temporal limitations to the grant. The grantor specifically stated in the grant that the owner of Lot 8 may only have use of an easement for "one year or upon completion of the driveway, whichever occurs first." [Emphasis added]. It is undisputed that Ms. Wescott completed a [50-foot] circular driveway with an entrance connecting directly to the Forest Road Easement. Likewise, it is undisputed that more than one year's time has passed since the grant of the "temporary Easement of Access" and several years have passed since the driveway was constructed.

With continuous, unimpeded access from the USFS, for over fifteen years, the terms of the Temporary Easement have long since expired. The District Court should not have given any enforcement rights to the Temporary Easement.

VI. Pursuant to I.A.R. 15, Respondent's Untimely Filed Notice of Cross Appeal Should be Dismissed for Lack of Jurisdiction.

"In Idaho, a timely notice of appeal or cross-appeal is a jurisdictional prerequisite to challenge a determination made by a lower court." *Carr v. Carr*, 116 Idaho 754, 757, 779 P.2d

429, 432 (Idaho App. 1989) (citing I.A.R. 15, 21). "Failure to file such a notice 'shall cause automatic dismissal' of the issue on appeal." *Id.* (citing I.A.R. 21).

Rule 15(b), Idaho Appellate Rules, sets out the time for filing a cross-appeal as follows:

> (b) **Time for filing**. A cross-appeal, as a matter of right, may be made only by physically filing the notice of cross-appeal with the clerk of the district court or administrative agency **within the 42 day time limit prescribed in Rule 14, as it applies to the judgment or order from which the cross-appeal is taken**, or within 21 days after the date of filing of the original notice of appeal, whichever is later.

Idaho Appellate Rule 15(b) (emphasis added).

The District Court denied Ms. Wescott's claim for attorney fees on November 3, 2014. R. Vol. I, p. 289. Mr. Wescott had 42 days from November 3, 2014 to file her Notice of Cross Appeal. The Notice of Cross Appeal (Suppl. R. Vol. I, p. 70) **was not filed until February 23, 2015, a full 112 days after** the "judgment or order from which the cross-appeal is taken."

Ms. Wescott may argue that her Motion to Reconsider Defendant's Memorandum of Costs extended the time to cross-appeal. However, the 42-day timeline is extended only if a timely motion is filed "which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action **(except motions . . . regarding costs or attorneys fees)**." I.A.R. 14(a) (emphasis added). It is well settled that "the filing of a motion for costs or attorney fees, or an objection to such a motion, does not extend the time to appeal a judgment" under I.A.R. 14(a). *State ex rel. Moore v. Lawson, 105 Idaho 164, 165, 667 P.2d 267, 268 (Ct.App.1983); See also Walton, Inc. v. Jensen*, 132 Idaho 716, 719, 979 P. 2d 118, 121 (Ct. App. 1999).

Because Ms. Wescott's cross-appeal was not timely filed, the Court is without jurisdiction to make a determination regarding those issues pursuant to I.A.R. 21. Accordingly, Respondent's cross-appeal should be dismissed.

Regarding the substance of Wescott's cross-appeal, attorney fees are not awardable to the prevailing party in a quiet title action. *Treasure Valley Concrete, Inc. v. State,* 132 Idaho 673, 978 P.2d 233 (1999); *Merrill v. Gibson,* 139 Idaho 840, 87 P.3d 949, cert. denied, 543 U.S. 926, 125 S. Ct. 311 (2004). This was not a Complaint brought or pursued frivolously under Idaho Code §12-121. Kirks will respond in substance after Ms. Wescott sets out her initial brief on the cross-appeal.

CONCLUSION

For the reasons stated above, the Kirks respectfully request that this Court reverse the District Court's judgment dismissing the Kirks' Complaint and order that the First Amended Complaint be allowed with a full trial on the issues of fact including intent of the Temporary Easement. Alternatively, Kirks request reversal and final judgment entered declaring the termination of the Temporary Easement and otherwise quieting the Kirks' title to the Temporary Easement and the whole of Lot 7.

DATED this 4 day of January, 2016.

EVANS KEANE LLP

By _____
Jed Manwaring, of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of January, 2016, a true and correct 2 copies of the foregoing document were served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Kim J. Trout	[4] U.S. Mail
Trout Law, PLLC	[ ] FAX
3778 N. Plantation River Dr., Ste. 101	[ ] Overnight Delivery
Boise, ID 83703	[ ] Hand Delivery
Fax: (208) 577-5756	[4] Email
Email: ktrout@trout-law.com	

Jed W. Manwaring

Jed W. Manwaring